

IN THE DISTRICT COURT OF THE VIRGIN ISLANDS  
DIVISION OF ST. THOMAS AND ST. JOHN

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	Criminal No. 2006-80
GELEAN MARK,	)	
VERNON FAGAN,	)	
WALTER ELLS,	)	
DORIAN SWAN,	)	
KELVIN MOSES,	)	
HENRY FREEMAN, and	)	
EVERETTE MILLS,	)	
	)	
Defendants.	)	
_____	)	

**ATTORNEYS:**

**Delia L. Smith, AUSA**  
St. Thomas, U.S.V.I.  
*For the Plaintiff,*

**Derek Hodge, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Gelean Mark,*

**Kevin D'Amour, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Vernon Fagan,*

**Carl R. Williams, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Walter Ells,*

**Thurston T. McKelvin, FPD**  
St. Thomas, U.S.V.I.  
*For the defendant Dorian Swan,*

**Andrew L. Capdeville, Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Kelvin Moses,*

**Dale L. Smith, Esq.**  
New York, NY  
*For the defendant Henry Freeman,*

**Arturo R. Watlington, Jr., Esq.**  
St. Thomas, U.S.V.I.  
*For the defendant Everette Mills.*

**MEMORANDUM OPINION**

Before the Court is defendant Henry Freeman's ("Freeman") motion for revocation or amendment of the Magistrate Judge's pretrial detention orders, entered on February 20, 2007, and April 9, 2007. For the reasons stated below, the Court will deny Freeman's motion.

**I. FACTS**

On December 19, 2006, Freeman was indicted for conspiracy to distribute a controlled substance and possession of a controlled substance on board an aircraft. The government moved for pretrial detention of Freeman, pursuant to title 18, section 3142 of the United States Code ("Section 3142").

**A. The January 3, 2007, Detention Hearing**

The Magistrate Judge conducted a hearing on the government's pretrial detention motion on January 3, 2007. Freeman was present and represented by counsel at the detention hearing.

Drug Enforcement Administration ("DEA") Agent Michael Goldfinger testified on behalf of the government. Agent Goldfinger testified that Freeman, who had previously been employed for American Airlines, was associated with the alleged conspiracy from 1991 until 2005 or later. Freeman's role was to communicate with co-conspirators located in various places in the continental United States regarding transporting cocaine through the Cyril E. King Airport in St. Thomas, Virgin Islands, for eventual distribution in the mainland. Freeman paid the drug couriers, arranged their travel details, and trained them to avoid detection at airports. Freeman, along with Gelean Mark ("Mark"), had access to and control of the proceeds from the narcotics sales. After Mark was arrested in October, 2005, Freeman assumed Mark's role as leader of the alleged narcotics conspiracy.

At the time Freeman was arrested, he had \$4,000 cash in his pocket. Freeman also gave conflicting information about his identity. He first gave the officers a false name. Subsequently, he presented the arresting officers with identification that stated his correct name. Freeman's arrest was otherwise without incident.

The government also presented evidence that Freeman is capable of operating private vessels, and has access to such

vessels. Freeman uses such vessels to make frequent trips to the British Virgin Islands. While Freeman is a United States citizen, he enjoys "belonger" status in the British Virgin Islands, allowing him to work and own property there. However, there is nothing in the record to suggest that Freeman has ever lived or worked in the British Virgin Islands.

The government also presented two investigative reports made by law enforcement officers, detailing Freeman's alleged drug and weapons smuggling activities on the sea. Both reports resulted in stops of Freeman on the high seas for allegedly failing to clear customs on the dates of the trips. However, Agent Goldfinger also testified that vessels are permitted to clear customs the day after they arrive at their destination. No criminal charges were ever filed against Freeman pursuant to either of the investigations. In fact, Freeman has no prior convictions in the Virgin Islands or in the continental United States.

Freeman's mother, Lecia Smith ("Smith"), testified on his behalf at the January 3, 2007, hearing and offered to serve as a third party custodian for him upon release. She stated that she was born on Tortola, and that is why Freeman enjoys "belonger" status in the British Virgin Islands. Smith currently resides on

St. Thomas, on the same premises as Freeman, his girlfriend, Anika Francis ("Francis"), and their two children. Smith frequently cares for Freeman's children while Francis works.

For approximately two or three years before he was arrested, Freeman was employed by Harris Construction Company as a laborer consultant. However, Freeman reduced his work schedule from full-time to part-time in February, 2006, in order to care for his father who had fallen ill. Smith explained that she supports Francis emotionally, and, on occasion, financially. Smith also emphasized that she has a very close relationship with Freeman, and that he listens to her and obeys her.

Furthermore, Smith owns the property where she lives, which was appraised at approximately \$330,000. She also owns another parcel in St. Thomas, appraised at approximately \$300,000, which carries a mortgage of approximately \$153,000. At the hearing, Smith indicated that she would be willing to post her interests in these properties as security for Freeman's release.

Francis also testified on Freeman's behalf and offered to serve as a third party custodian for him upon release. She stated that Freeman had a very close relationship with their two children, and often cared for them while she was at work.

Francis was aware of Freeman's frequent travels. She was unaware if the travel was for the purposes of drug trafficking. Francis indicated that Freeman's incarceration works a hardship on her and her two children as well as Freeman's father, who Freeman has cared for since his stroke in February, 2006. Francis also indicated that she sometimes relied on Smith for financial support.

Finally, Freeman's aunt, Lorriel Weekes ("Weekes"), offered her real property in St. Thomas, U.S. Virgin Islands, as well as a taxi medallion to assist in securing her nephew's release.

On February 20, 2007, the Magistrate Judge granted the government's motion and ordered that Freeman be detained pending further disposition of this matter.

**B. The March 23, 2007, Detention Hearing**

Freeman moved for reconsideration of the detention order, and the Magistrate Judge conducted a second detention hearing on March 23, 2007. Again, Freeman was present and represented by counsel. At the hearing, Freeman presented an irrevocable waiver of extradition, which he is prepared to sign as a condition of his release. Freeman proffered that he would consent to the imposition of home confinement and electronic monitoring as conditions of his release. Additionally, Augustin Ayala, Esq.,

Assistant Legal Counsel for the Legislature of the Virgin Islands, testified that he had known Freeman "like a son" for many years, and would be willing to serve as third party custodian for Freeman. Attorney Ayala had no property to offer as security for Freeman's release, but did state that he would be willing to sign an agreement promising to pay the government money if Freeman violated the conditions of his release. The government presented no evidence at the March 23, 2007, hearing. On April 9, 2007, the Magistrate Judge again ordered that Freeman be detained pending trial.

On June 16, 2007, Freeman moved for revocation or amendment of the Magistrate Judge's detention orders. On July 17, 2007, Freeman filed a renewed motion for revocation or amendment of the detention orders, which included absolutely no changes that were not in his original motion.

## **II. DISCUSSION**

Title 18, section 3145(b) of the United States Code ("Section 3145(b)") provides that a person who has been ordered to be detained pending trial by a magistrate judge may move for revocation or amendment of the detention order in the court with original jurisdiction over the matter. 18 U.S.C. § 3145(b) (1990). "When the district court acts on a motion to revoke or

amend a magistrate's pretrial detention order, the district court acts *de novo* and must make an independent determination of the proper pretrial detention or conditions for release." *United States v. Rueben*, 974 F.2d 580, 585-86 (5th Cir. 1992); *cf.* *United States v. Delker*, 757 F.2d 1390, 1394 (3d Cir.1985) (holding that the Bail Reform Act, 18 U.S.C. § 3145(b), *et seq.*, contemplates *de novo* review by the district court of a magistrate's order for bail pending trial). Under this standard, "a district court should not simply defer to the judgment of the magistrate. . . ." *United States v. Leon*, 766 F.2d 77, 80 (2nd Cir. 1985) (noting that a reviewing court "should fully reconsider a magistrate's denial of bail").

In conducting a *de novo* review of a magistrate judge's pretrial detention order, the court may rely on the evidence presented before the magistrate judge. See *United States v. Koenig*, 912 F.2d 1190, 1193 (9th Cir. 1990) ("[T]he district court is not required to start over in every case . . . ."); *United States v. Chagra*, 850 F. Supp. 354, 357 (W.D. Pa. 1994) (noting that the court may incorporate the records of the proceedings and the exhibits before the magistrate judge). Though not required to do so, the reviewing court may, in its discretion, choose to hold an evidentiary hearing if necessary or

desirable to aid in the determination. *See Koenig*, 912 F.2d at 1193; *see also United States v. Lutz*, 207 F. Supp. 2d 1247 (D. Kan. 2002) ("*De novo* review does not require a *de novo* evidentiary hearing.>").

### III. ANALYSIS

Freeman argues that the evidence presented at the detention hearings on January 3, 2007, and March 23, 2007, supports the conclusion that he should be released pending trial.

Pretrial detention of a criminal defendant will be ordered only if, after a hearing upon motion by the government, a "judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(e) (2006). Furthermore, a finding by the judicial officer that there is probable cause to believe the defendant committed "an offense for which a maximum term of imprisonment of ten years or more is prescribed in the Controlled Substances Act (21 U.S.C. § 801 *et seq.*)" raises the rebuttable presumption that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." *Id.*

The fact that a defendant has been indicted for a crime carrying a maximum prison term of ten years or more under the Controlled Substances Act is sufficient to support a finding of probable cause, triggering the rebuttable presumption in favor of pretrial detention. *See United States v. Suppa*, 799 F.2d 115, 119 (3d Cir. 1986) ("[B]ecause an indictment . . . conclusively demonstrates that probable cause exists to implicate a defendant in a crime, [t]he indictment, coupled with the government's request for detention, is a sufficient basis for requiring an *inquiry* into whether detention may be necessary." (internal citations and quotations omitted)).

The showing of probable cause (by means of an indictment) may be enough to justify detention if the defendant fails to meet his burden of production, or if the government's showing is sufficient to countervail the defendant's proffer, . . . but it will not necessarily be enough, depending upon whether it is sufficient to carry the government's burden of persuasion.

*Id.* (quoting *United States v. Hurtado*, 779 F.2d 1467, 1478 (11th Cir. 1985)) (emphasis in original). To rebut the statutory presumption in favor of detention, a defendant must produce "some credible evidence" to assure his presence before the court and the safety of the community. *United States v. Carbone*, 793 F.2d 559, 560 (3d Cir. 1986).

The determination of whether any conditions of release can reasonably assure the defendant's appearance in court and the safety of others is based on the following four factors:

(1) the nature and seriousness of the offense charged; (2) the weight of the evidence against the person; (3) the history and characteristics of the person; and (4) the nature and seriousness of the danger to any person and the community that would be posed by the person's release.

*United States v. Traitz*, 807 F.2d 322, 324 (3d Cir. 1986) (citing 18 U.S.C. § 3142(g) ("Section 3142(g)")); see also *United States v. Coleman*, 777 F.2d 888, 892 (3d Cir. 1985).<sup>1</sup>

Here, the testimony of Smith and Francis demonstrated that Freeman had family ties in the Virgin Islands, as well as care taking responsibilities for his children and ailing father. Freeman also expressed a willingness to sign an irrevocable waiver of extradition to address any concerns about his

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<sup>1</sup> The sub-factors relevant to the consideration of a defendant's characteristics and history include:

(A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

(B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law . . . .

"belonger" status in the British Virgin Islands. Freeman's family members offered three parcels of real property and a taxi medallion as security for his release. That evidence weighs in favor of Freeman's argument that he does not present a flight risk. Significantly, however, no member of the community who was not a family member of Freeman offered anything as security for his release. Though Freeman was employed part-time prior to his arrest, he presented no evidence that he would be able to secure employment if released pending trial.

The fact that Freeman was a leader in the drug conspiracy indicates a heightened propensity for flight and dangerousness to the community. *See United States v. Martir*, 782 F.2d 1141, 1147 (2d Cir. 1986) ("The government's informal proffer that he was the mastermind of a narcotics scheme tended to show that [the defendant] not only had reason to expect a greater sentence than his co-defendants, but also had greater opportunities to flee due to greater wealth and better contacts."). The government also presented evidence that Freeman traveled frequently and possesses the means and sophistication to leave the territory undetected by law enforcement.

Additionally, it is undisputed that Freeman lied about his name at the time of his arrest. Indeed, the circumstances

surrounding Freeman's arrest suggest deceptiveness, and do not speak well of his character. Moreover, the evidence presented by Freeman was inadequate to rebut the presumption that he posed a danger to the community. *See United States v. Perry*, 788 F.2d 100, 115 (3d Cir. 1986) (explaining that the type of evidence that may be adequate to rebut the presumption of dangerousness includes "testimony by co-workers, neighbors, family physician, friends, or other associates concerning the arrestee's character, health, or family situation"); *compare United States v. Carbone*, 793 F.2d 559, 561 (3d Cir. 1986) ("Although posting a property bond normally goes to the question of defendant's appearance at trial, where the surety takes the form of residential property posted by [non-family] community members[,], the act of placing this surety is a strong indication that the private sureties are also vouching for defendant's character.").

After reviewing the evidence presented below in light of the factors outlined in Section 3142(g), the Court finds that Freeman has failed to rebut the statutory presumption that no condition or combination of conditions would reasonably assure his presence in court and the safety of the community. *See, e.g., United States v. Suppa*, 799 F.2d 115, 119-120 (holding that the defendant, charged with conspiracy to distribute cocaine, failed

to rebut the statutory presumption against pretrial release where he presented no testimony by co-workers, neighbors, family physicians, friends or other associates showing that he would not pose a danger to the community upon release); *Perry*, 788 F.2d at 106-07 (holding that the defendant's testimony about his ties to the community and the fact that he had obeyed the conditions of his release on state charges, was inadequate evidence to rebut the presumption of dangerousness triggered by his indictment on drug conspiracy charges).

#### **IV. CONCLUSION**

Based on the foregoing reasons, the Court will deny Freeman's motion for revocation or amendment of the Magistrate Judge's order for pretrial detention. An appropriate order follows.

**Dated: August 25, 2007**

S\\_\_\_\_\_  
**CURTIS V. GÓMEZ**  
**Chief Judge**

Copy: Hon. Geoffrey W. Barnard  
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